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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 559 F. 2d 1112. The decisions and orders of the National Labor Relations Board (Pet. Apps. C and D) are reported at 224 NLRB 1221 and 1226.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 3, 1977. On October 20, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 1, 1977. The petition was filed on November 25, 1977, and was granted on February 21, 1978 (A. 230). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether application of the National Labor Relations Act to schools operated by the Roman Catholic Church, which teach both religious and secular subjects, violates the Establishment or Free Exercise Clauses of the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Section 1. * * *

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. * * *

* * * * *

(2) The term "employer" includes any person acting as an agent of any employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. The Schools Involved

1. Respondent, The Catholic Bishop of Chicago, a corporation sole, operates two secondary schools for boys, Quigley North and Quigley South, in Chicago, Illinois. The schools' academic and extracurricular programs, as well as their admissions and vocational guidance policies, indicate that they are essentially college preparatory high schools, with curricula "reflecting the educational concepts that are developed in corresponding institutions of secular teaching" (A. 67, 101).[1]

Thus, in addition to courses in religion,[2] the Quig-

[1] Although the Quigleys are called "minor seminaries" or "seminary high schools," a student need not indicate any intention or desire to become a priest in order to gain admission to the schools, if he has the "kind of character, ability, and temperament which might lead to the personal discovery of a vocation" at some later point. Boys who enter the Quigley schools with the intention of studying for the priesthood and then change their minds nevertheless may continue their education there. Moreover, the majority of recent graduates of the Quigleys have gone on to attend public or private colleges or have obtained secular employment, rather than entering the Diocesan Seminary College as candidates for the priesthood. The Quigleys, therefore, are primarily involved in providing a college preparatory education for boys who have a "potential for Christian leadership" (A. 32-33, 46-47, 73, 108-109, 131-141).

[2] Required courses in religion are given for one class period five days a week at Quigley North and three days a week at

leys offer a wide range of courses in mathematics, English, social studies, sciences, foreign languages, fine arts and physical education (A. 59, 78, 80, 89-93, 121-122). Some courses, taught by teachers from Chicago City College, may be taken for college credit. Driver education is offered at both schools; at Quigley North the driver education instructor is provided and paid by the City of Chicago (A. 93-94, 109).

Students at the Quigleys participate in a variety of extracurricular activities, including debating teams, student publications, band and chorus, dramatic productions, and volunteer services, and compete against both Catholic and non-Catholic schools in academic disciplines and varsity sports (A. 59, 69, 94-95, 107-108, 119-120, 122-123). Students also are offered vocational guidance counseling, including meetings at the school with recruiters from secular institutions such as the United States Army (A. 110). The Quigley schools are approved and "fully recognized" (a form of certification beyond minimum state requirements) by the State of Illinois and are accredited by the North Central Association of Secondary Schools and Colleges (A. 68-69, 74-76, 83, 104).

Respondent operates the Quigleys through intermediaries, principally the Vicar General of the Archdiocese and a rector, or chief administrative officer, appointed for each school (A. 37, 63-64). The rectors make decisions regarding the hiring, firing, and dis-

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Quigley South, under the auspices of the "Formation Department" (A. 78, 80, 101, 103).

ciplining of teachers after consulting with various department chairmen, who may be lay teachers (A. 112-114, 145). All full-time teachers employed at the schools have individual written employment contracts with respondent, which require them to meet the educational standards set by the North Central Association and to be certifiable by the State of Illinois (A. 69-70, 119, 145). The contracts specify the teaching responsibilities of faculty members and the grounds for their discharge and establish a grievance procedure for the resolution of disputes that culminates in arbitration before a Board of Conciliation and Arbitration (A. 115, 143-154). The salary schedule attached to the contracts is based in part upon discussions between the Vicar General of the Archdiocese and a Teachers' Committee composed of both priests and lay faculty, as well as upon input from other groups (A. 71-72). The contracts offer a number of fringe benefits to all full-time employees of the Archdiocese, including a group hospitalization plan, a pension program, sick leave, bereavement leave, leaves of absence, and tenure (A. 70, 147-149). Although not specified in the contracts, all teachers also receive a life insurance policy (A. 70).

The total annual operating budget for the Quigley schools exceeds $1 million and the value of purchases received from outside the State of Illinois exceeds $65,000. Moreover, the Archdiocese, which has far greater gross revenues, provides direct financial assistance to both schools, approves their budgets, and administers or oversees the administration of funds

for the schools. On occasion the Archdiocese has paid teachers' dues to national professional organizations and has absorbed the cost of teacher attendance at national educational conventions (Pet. App. 88a-89a; A. 64-66, 120, 126, 211). Quigley South also participates with the Chicago Board of Education in a program through which the school has received thousands of dollars' worth of library books purchased with federal appropriations (A. 116-118).

2. Respondent Diocese of Fort Wayne-South Bend, Inc., operates five high schools in 14 counties in northeastern Indiana (A. 159, 169).[3] Like the Quigleys, these high schools provide a full program of general studies, in addition to courses in religion, and offer a wide range of extracurricular activities, including participation in varsity athletic competition (A. 175, 198-200). Unlike the Quigleys, however, the Diocesan high schools do not require a student to have demonstrated a particular interest in the priesthood, or a potential for Christian leadership, in order to gain admission. The schools' emphasis is on providing high school students with a "total education" in secular subjects and a "spiritual dimension" (A. 165, 170). They admit some non-Catholic students and employ some non-Catholic teachers (A. 170-171, 196). The schools, and the teachers they employ, are certified by the State of Indiana, which regulates

[3] The schools are South Bend St. Joseph High School, Mishawaka Marian High School, Fort Wayne Bishop Luers High School, Fort Wayne Bishop Dwenger High School and Huntington Catholic High School.

certain educational matters such as the length of the school day (A. 171-172, 189, 200). The schools also belong to the Indiana High School Athletic Association (A. 175).

The Indiana schools are administered by a Superintendent of Education for the Diocese. The Superintendent is appointed by the bishop but is also responsible to the Diocesan and Fort Wayne-Huntington Boards of Education (A. 162, 184, 186-187). The Diocesan Board makes the policy decisions for the high schools, sets tuition rates, maintains the buildings, and determines teachers' wage rates (A. 161, 163-164, 171, 174, 177-179).[4] General policy is contained in a handbook prepared by the Board with the assistance of various groups, including the Catholic Teachers' Association (C.T.A.), a voluntary association of religious and lay teachers employed in the Diocesan schools (A. 172-173).[5]

Principals at three of the five schools are appointed by the Superintendent of Education with the approval of the Diocesan Board and the bishop; the other two principals are appointed by the heads of the religious

[4] Although the bishop has ultimate authority with respect to these matters, he has never overruled the Diocesan Board (A. 174).

[5] On one occasion, the C.T.A. not only participated in the determination of wage rates for teachers, but also discussed with the Superintendent the possibility of reducing a wage increase in order to enable the Diocese to provide paid health benefits. Largely as a result of these discussions, a group health policy was offered to individual teachers willing to pay for it (A. 174-175).

orders that teach at those schools (A. 164). These principals work not only with the Diocesan Board and the Superintendent's office, but also with an Area Board and an Advisory Board set up for each high school (A. 163). The principals hire teachers on the basis of applications submitted to, and personnel files maintained by, the Diocese (A. 165). Although the principals act as agents of the Diocesan Board in negotiating and signing employment contracts with individual teachers, the basic contract is determined by the Diocesan Board and is published in the policy handbook (A. 174, 190-194). The contract specifies the teacher's wage rate, employment benefits, and responsibilities and provides an opportunity for a hearing before the teacher may be discharged (A. 193-194). Grievances under the contracts are resolved by the Diocesan Board (A. 174). The annual budget for the five Diocesan high schools exceeds $1 million, much of which comes from tuition paid by the students at rates set by the principal in conjunction with the local boards and subject to the approval of the Diocesan Board (A. 159-160, 163-164, 166, 227-228).

B. The Board Proceedings

In September and October 1975, pursuant to separate representation petitions filed by the Quigley Education Association, an affiliate of the Illinois Education Association, and the Community Alliance for Teachers of Catholic High Schools (the "Unions") under Section 9(c)(1) of the National Labor Rela-

tions Act, 29 U.S.C. 159(c)(1), elections were conducted in two units composed of all lay faculty members of the high schools operated by respondents (the "Employers") (Pet. 6; Pet. App. 85a, 92a).[6] The Unions won the elections and were certified as the exclusive bargaining representatives of the employees in the units. After the Employers refused to bargain with the Unions, the Regional Director issued complaints alleging that the Employers' conduct violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158 (a)(5) and (1). The Employers admitted their refusal to bargain but contended, as they had in the earlier representation proceedings, that the schools involved were "completely religious" and thus that the Board should decline to assert jurisdiction under its discretionary standard.[7] They further argued that,

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[6] The unit at the Quigley schools consisted of 46 teachers, while the unit at the Indiana schools consisted of approximately 182 teachers (Pet. 6).

[7] In *Cornell University*, 183 NLRB 329, 334, the Board announced that it would assert jurisdiction over nonprofit, private educational institutions that met a specified dollar-volume standard (at present, gross annual revenues of $1 million or more, 29 C.F.R. 103.1). See *National Labor Relations Board* v. *Mercy College*, 536 F. 2d 544 (C.A. 2); *National Labor Relations Board* v. *Wentworth Institute*, 515 F. 2d 550 (C.A. 1). However, in *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037, the Board determined that, even where this dollar standard had been satisfied, it would decline to assert jurisdiction over "institutions primarily religious and noncommercial in character and purpose, whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs," because to do so "would not effectuate the policies of the Act." See also

in any event, the Board's assertion of jurisdiction over such schools was prohibited by the First Amendment (Pet. App. 55a-56a, 71a).

The Board held that the Employers were not entitled to relitigate the determinations made in the representation proceedings that the schools, while religiously associated, were not completely religious, because they "operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction" (Pet. App. 87a; see *id.* at 93a n. 2, 58a-59a, 74a).[8] The Board also rejected the Employers' constitutional claims for the reasons set forth in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles*, 223 NLRB 1218, pending on petition for review, C.A. 9, No. 77-1286, which it summarized as follows (Pet. App. 58a-59a, 74a):

> (1) [T]he purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective.

Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools), 210 NLRB 1053, 1058.

[8] In the Quigley representation proceeding, the Board explained that its "policy is to decline jurisdiction over religiously sponsored organizations 'only when they are completely religious, not just religiously associated'" (Pet. App. 86a), quoting from *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB 249, 250. See note 7, *supra*.

Accordingly, the Board concluded that the Employers had violated Section 8(a)(5) and (1) of the Act, and it ordered them to cease and desist from the unfair labor practices and to bargain collectively with the Unions (Pet. App. 65a-67a, 81a-82a).

C. The Decision of the Court of Appeals

The court of appeals denied enforcement of the Board's orders (Pet. App. 1a-50a). Initially, the court concluded that the Board's determination that the schools involved here were not "completely religious" and, hence, were within the Board's jurisdictional standard, was an abuse of discretion in light of this Court's recent decisions involving state aid to parochial schools, in which such schools "had been generically labeled in a manner which appeared to be inconsistent with a constitutional basis for differentiating between 'completely religious' and 'religiously associated'" (*id.* at 21a).[9]

Having rejected the Board's discretionary effort to exempt certain religious schools from its jurisdic-

[9] Specifically, the court of appeals relied on statements in *Lemon* v. *Kurtzman*, 403 U.S. 602, and *Meek* v. *Pittenger*, 421 U.S. 349, that parochial schools are "'an integral part of the religious mission of the Catholic Church'" involving "substantial religious activity and purpose" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616), and that the "'secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence" (*Meek* v. *Pittenger*, *supra*, 421 U.S. at 366).

tion, the court of appeals went on to decide "the larger constitutional question," because "it would follow that the Board would necessarily have to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates" (Pet. App. 27a). The court concluded that the Board's assertion of jurisdiction over parochial schools violates the Establishment and Free Exercise Clauses of the First Amendment.[10] It found that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools." Religious officials would "[n]o longer * * * be the sole repository of authority as required by church law," but would have "to share 'some decision-making' with the union" (*id.* at 27a). Moreover, in the court's view, the "Board's order to bargain unquestionably * * * inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern" (*id.* at 29a-30a):

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of

[10] The court of appeals drew no distinction between the two Religion Clauses of the First Amendment in its discussion because of its "belief that there has been some blurring of sharply honed differentiations" (Pet. App. 48a). It found that the Board's involvement in the labor relations of church-related schools ran afoul of both Clauses, which have "the identical purpose of maintaining a separation between Church and State" (*id.* at 49a).

> the institutions, or because he wanted to replace lay teachers with religious-order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. * * * The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. * * * If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

Although the court of appeals noted that the Act's imposition of a bargaining obligation inevitably results in some restriction on every covered employer's freedom to conduct his business, it concluded that such restrictions, while justified "on the general industrial and commercial scene" by sound legislative policy considerations, must give way when they con-

flict with the First Amendment (Pet. App. 30a). The court also distinguished "permissible governmental impingements upon the operation of the church schools," such as fire inspections, zoning laws, and state compulsory attendance requirements, on the ground that such regulations, unlike a Board bargaining order, have no "clear inhibiting potential upon the relationship between teachers and employers" (*id.* at 30a-31a). Finally, the court observed that such regulations applied equally to all schools, whereas the Board's determination to assert jurisdiction over parochial schools did not apply to public schools, which are expressly exempted from the statutory definition of "employer" (*id.* at 32a).

SUMMARY OF ARGUMENT

I.

The Free Exercise and Establishment Clauses of the First Amendment, which are aimed at preserving government neutrality in religious matters while securing religious liberty to the individual, "forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, 370 U.S. 421, 430. Since this case involves the question whether the requirements of the National Labor Relations Act infringe the freedom of religious action enjoyed by the Employers under the First Amendment in the operation of their schools, the relevant analysis is the one repeatedly utilized by this Court in free exercise cases.

In order to demonstrate that legislation is in conflict with the Free Exercise Clause, "it is necessary * * * for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223. Coercion alone, however, is insufficient to sustain a free exercise claim. Although the Clause's protection of religious beliefs is absolute, religiously based conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. Thus, even governmental regulations that inhibit conduct mandated by religious convictions, if justified by "interests of the highest order and those not otherwise served[,] can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215. The Employers' First Amendment challenge to the Act fails on both scores.

A. The Employers do not contend that collective bargaining is contrary to their religious principles. Indeed, the Catholic Church supports the objectives of the Act—to encourage collective bargaining in labor relations and to protect employees' rights to free association. However, the Employers assert, and the court of appeals agreed, that a government order requiring parochial school officials to bargain with a union representing their lay teachers would be inconsistent with the bishops' authority over the schools under church law and would tend to deter the bishops from taking action mandated by religious policy. This contention is based on a misconception of the struc-

ture of the Act and the Board's role in administering it.

The orders involved in this case merely require the Employers to bargain in good faith with the unions representing their lay teachers concerning wages, hours, and other conditions of employment. The Act does not require the Employers to make any concessions to union requests at the bargaining table and, should a bona fide impasse be reached, the Employers would be free to implement their own proposals unilaterally. The Employers have never contended that there are no subjects over which bargaining may occur without raising constitutional questions, and any objections to bargaining over a specific subject are premature at this stage, for no bargaining has yet occurred and the Board has not yet been asked to determine whether any particular matter is a mandatory subject for discussion. What is more, the Employers cannot be required to bargain over a subject that they believe must be excluded from bargaining under their religious principles unless and until the Board orders such bargaining and the Board's order has been enforced by the courts.

By the same token, the court of appeals' concern over the Board's handling of the hypothetical case of a teacher allegedly discharged for union activity, where the Employers defend the discharge on religious grounds, is also premature. *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 131-132. In any event, in deciding whether the firing of an employee was unlawful, the Board would have no

occasion to inquire into the validity of any religious beliefs asserted to have been the actual motivation for the discharge. The Board's sole concern would be to determine whether the employer's actions were undertaken out of antiunion animus, a factual issue that the Board and the courts regularly decide in a variety of contexts without invading the province of the employer or assessing the substantiality of his beliefs. A discharge for religious reasons, of course, does not violate the Act, regardless of whether those reasons are "valid" or even generally accepted.

There is, moreover, nothing to suggest that application of the Act to parochial schools would "chill" the Employers from acting in accordance with their religious principles in operating the schools. The court of appeals offered no evidence that other employers subject to the Act are deterred from making employment decisions for fear of unfair labor practice charges, and the Employers would not be called upon to defend their actions in unfair labor practice proceedings unless the General Counsel was first able to sustain his burden of showing that the actions were *prima facie* unlawful.

B. Even if the orders in this case could be shown to regulate conduct based upon religious convictions, the Board's assertion of jurisdiction would nevertheless be permissible if justified by a compelling governmental interest. *Wisconsin* v. *Yoder*, 406 U.S. 205, 214. The importance of the Act's goal of avoiding labor strife that would disrupt the free flow of

commerce by protecting the right of employees to organize and bargain collectively has repeatedly been recognized by the courts in rejecting claims that the statute's mandatory bargaining and union shop provisions must yield to conflicting religious beliefs. This compelling public interest in labor peace unquestionably is served by extending the Act's protection to the large number of lay teachers employed in parochial schools that affect commerce. The impact of this class of employers on the economy is substantial, and labor disputes are as likely to occur in parochial schools as they are in other private schools covered by the Act.

II.

In order to pass muster under the Establishment Clause, "a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive governmental entanglement with religion." *Wolman* v. *Walter*, 433 U.S. 229, 236. The Employers and the court of appeals have never disputed that the Act has "a secular legislative purpose" and that its primary effect, even as applied to parochial schools, "neither advances nor inhibits religion." They contend, however, in reliance upon decisions of this Court striking down state aid to parochial schools, that the Board's assertion of jurisdiction would violate the Establishment Clause because it necessarily would lead to a governmental intrusion into the religious operations of the schools.

Unlike state statutes granting aid to pupils in church-related elementary and secondary schools, the Act involves no attempt to provide funds for the secular activities of the school. The Board thus would have no occasion to monitor the schools' religious activities or to attempt to identify religious content in classroom instruction. The Board's functions—affording employees of parochial schools a fair opportunity to determine whether they desire to be represented by a union for collective bargaining purposes and, if a union is selected, to protect its right to engage in bargaining—are functions that it performs daily in connection with a variety of businesses, including some (such as the newspaper industry) that enjoy First Amendment protection, and that it can easily discharge without becoming enmeshed in religious matters. The Act therefore does not suffer the "excessive governmental entanglement with religion" that was fatal to the school aid legislation.

In sum, there is no contention that the Board has failed to act neutrally with regard to religion in applying the Act to all religious schools within its jurisdictional guidelines. Rather, the Employers' complaint is that the Board has been entirely too neutral in refusing to grant them a special exemption from obligations incurred by all similar employers under the Act solely because of their "religious mission." The court of appeals, by granting such an exemption on the basis of religious considerations that are either nonexistent or at best speculative, has disregarded this Court's admonition that courts "must not ignore

the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220-221.

ARGUMENT

I. The Board's Assertion Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Do Not Violate The Free Exercise Clause Of The First Amendment

The Religion Clauses of the First Amendment, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," are aimed at preserving governmental neutrality in matters pertaining to religion while securing religious liberty to the individual, free of governmental restraints. Although the two clauses thus serve a common purpose, and may overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, 370 U.S. 421, 430. See also *Abington School District* v. *Schempp*, 374 U.S. 203, 221. The Free Exercise Clause provides an "absolute prohibition of infringements on the 'freedom to believe'" and a qualified restriction on governmental interference with religiously-based actions (see *McDaniel* v. *Paty*, No. 76-1427, decided April 19, 1978, slip op. 7-9), while the "Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by

the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not" (*Engel* v. *Vitale*, *supra*, 370 U.S. at 430).

This case involves the question whether the application, to schools operated under the auspices of the Catholic Church, of religiously neutral legislation aimed at preserving labor peace by encouraging collective bargaining, infringes the religious freedoms that those schools enjoy under the First Amendment. The National Labor Relations Act has a legislative purpose that is entirely secular and a primary effect that neither advances nor inhibits religion. Accordingly, in our view, the relevant analysis is that which this Court has repeatedly utilized to adjudicate claims under the Free Exercise Clause.[11]

This Court has recognized on a number of occasions that "a violation of the Free Exercise Clause is predicated on coercion" and that, therefore, "it is necessary * * * for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 223.[12] Even if legisla-

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[11] Since the court of appeals found a violation of both the Free Exercise and the Establishment Clauses, we address the Establishment Clause question in point II, *infra*, pp. 41-46.

[12] It is not enough to show that the conduct sought to be protected by the Free Exercise Clause is engaged in by an institution established for a religious purpose. In order to enjoy immunity from otherwise valid governmental regula-

tion has a "coercive effect," however, it must be determined whether the impact is upon beliefs or conduct, since the Free Exercise Clause embraces two concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. Hence, while the government may never prohibit or burden religious beliefs, "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably restricted by neutral legislation. *Braunfeld* v. *Brown*, 366 U.S. 599, 603. See *McDaniel* v. *Paty*, *supra*, slip op. 8-9 and n. 8; *Reynolds* v. *United States*, 98 U.S. 145, 166. Governmental regulations that inhibit conduct mandated by religious beliefs, if justified by "interests of the highest order and those not otherwise served, can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 215. See *Sherbert* v. *Verner*, 374 U.S. 398, 403. Application of these principles demonstrates that the Board's actions in these cases do not violate the Free Exercise Clause of the First Amendment.

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tion, the very actions interdicted by the regulation "must be rooted in religious belief." *Wisconsin* v. *Yoder, supra*, 406 U.S. at 215. See also *Brown* v. *Dade Christian Schools, Inc.*, 556 F. 2d 310, 313 (C.A. 5) (plurality opinion), certiorari denied, No. 77-621, February 21, 1978.

A. *Subjecting the Employers to Board Jurisdiction Would not Require Them to Take Action Inconsistent With Their Religious Beliefs*

The purpose of the National Labor Relations Act, to encourage the practice and procedure of collective bargaining in order to preserve industrial peace and protect workers' rights, is entirely secular. Moreover, the Board orders in these cases do no more than require the Employers to bargain collectively with the union representative chosen by groups of their lay faculty, rather than to execute a separate employment contract with each employee as had been done previously (see pp. 7, 10, *supra*). The Employers have never alleged that bargaining with a union is contrary to their religious beliefs;[13] indeed, they do not contend that there would be any constitutional objection to the Board's assertion of jurisdiction over their labor relations with their non-professional staff,

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[13] To the contrary, leaders of the Catholic Church have consistently defended "the workers' natural right to enter into association with his fellows" for the purpose of bargaining collectively with their employer and have recognized the duty of government "to protect the rights of all its people, and particularly of its weaker members, the workers * * *." "Mater et Magistra," an encyclical of Pope John XXIII on Christianity and Social Progress (May 15, 1961), reprinted in *The Encyclicals and Other Messages of John* XXIII 255-256 (1964). See also Pope Leo XIII, *Rerum Novarum* (Parkinson ed. 1924); Hearings on H.R. 8410 (Labor Reform Act of 1977) before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 95th Cong., 1st Sess. 453-458 (1977) (testimony of Monsignor George C. Higgins, Secretary for Research of the United States Catholic Conference).

such as janitors (and, presumably, office or cafeteria workers) (Br. in Opp. 5). They assert only that the First Amendment prohibits a governmentally imposed order requiring them to bargain with their teachers (*id.* at 5-6).

The court of appeals agreed with this contention. Although the court acknowledged (Pet. App. 30a-31a) that church-related schools are not immune from governmental regulations such as fire inspections, zoning ordinances, health and safety standards, compulsory attendance requirements and a host of other official restrictions that may have an unintended, incidental effect upon the schools' religious operations (see *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614), it concluded that application of the Act to such schools is impermissible because "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law" (Pet. App. 27a). The court stated that the Act's requirements would impose a "chilling aspect" on "the exercise of the bishops' control of the religious mission of the schools" (*id.* at 29a). School officials, it reasoned, might be induced to forego their right to take a bargaining position required by church doctrine or to fire a heretical teacher who is also a union adherent because the exercise of their rights would entail "the risk of a protracted and expensive unfair labor practice proceeding before the Board

which would certainly in part involve the Church's religious policies and beliefs" (*id.* at 30a).

There is no support for the court of appeals' conclusion that the Act violates the Free Exercise Clause because of the mere possibility of governmental intrusion into religious aspects of the employment relationship between parochial schools and their lay faculty. In furtherance of the strong interest of the State "in insuring that its youth receive an adequate secular education," the government may require that church-related schools only employ teachers with adequate academic and other qualifications and "may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman* v. *Walter*, *supra*, 433 U.S. at 240. The State may also insist that parochial schools, if they are to satisfy compulsory attendance laws, offer a curriculum and a minimum number of hours of instruction comparable to that provided in public schools. See *Board of Education* v. *Allen*, 392 U.S. 236, 245-246; *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 236; Ill. Rev. Stat. ch. 122, § 26-1.1 (1975).

These requirements, the constitutionality of which has not been questioned, may well have more of an "inhibiting potential upon the relationship between teachers and employers" (Pet. App. 31a) in religiously affiliated schools than would application of the Act to those schools.[14] But more important, the

[14] The fact that parochial schools must comply with these regulations also undermines the court of appeals' view that the denial of government financial aid to such schools entitles them to be free of obligations under the Act (Pet. App. 46a).

court's pervasive assumption that subjecting parochial schools and their lay teachers to the rights and obligations of the Act would alter the authority of the bishop, would "chill" other school officials in the free exercise of their religious beliefs, and would unduly entangle the Board in religious affairs rests upon an erroneous understanding of the structure of the Act and of the Board's role in enforcing its provisions.

1. The Board's orders in these cases merely require the Employers and the Unions to bargain in good faith about wages, hours, and other terms and conditions of employment,[15] and to incorporate any agreement reached in writing. The Board is in no sense a participant at the negotiating table, nor can it compel a party to make any concessions or to agree to any substantive contractual provision. See 29 U.S.C. 158(d); *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. If the parties reach a bona fide impasse in negotiations, the Employers would be free unilaterally to institute their own proposals. See *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-225.

The Board has not yet been called upon to determine whether bargaining about any particular subject, in the context of a parochial school, is mandatory under the Act, but neither the Employers nor the court of appeals has taken the position that there are *no* subjects that may be bargained about without raising constitutional problems. If a union were ever to demand that the Employers negotiate about a subject that the Employers believed to be inappropriate for collective bargaining under the Act or the Constitution, the Employers would be free to refuse to do so and to test the validity of their position before the Board and the courts. They would not be obliged to bargain about that subject unless, and until, the Board had rejected their claim and the Board's order had been enforced following judicial review. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50. Even then, their obligation would be only to bargain in good faith, not to surrender their bargaining position or their belief. The Board's bargaining orders, therefore, would not impair the bishops' ultimate authority to govern the religious aspects of their schools.[16]

[15] While the parties may voluntarily bargain about other subjects, the Act does not require them to do so, and Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3), would protect the Employers from strikes in support of union demands on nonmandatory subjects. See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

[16] Indeed, other Catholic schools quite similar to those involved here have voluntarily engaged in collective bargaining with unions representing their lay teachers. See *Archdiocese of Philadelphia*, 227 NLRB 1178, 1180; Lett and Mleczko, *Teachers' union demands troubling Catholic schools*, The Detroit Sunday News, June 12, 1977; Hyer, *Catholic Board Endorses Unions for Lay Teachers*, The Washington Post, September 20, 1977. After the court below issued its decision in this case, Bishop William McManus of respondent Diocese of Fort Wayne-South Bend issued a press release in which he "urged Catholic school administrators and teachers to 'get busy' with contract negotiations * * *." Foster, *Winners Happy, Losers Unhappy*, The Catholic Standard and Times, August 11, 1977.

Equally unjustified are the court of appeals' assumptions regarding the Board's role in discriminatory discharge cases. In determining whether the firing of an employee (or any other employer business decision) may have constituted an unfair labor practice, the Board's concern focuses exclusively on the secular issue of antiunion conduct, not the validity of the beliefs that the employer alleges to have been the motivation for his actions. Hence, if a church official were to contend that a teacher, allegedly discharged for union activity, was in fact fired for espousing heretical views, the Board's role would be limited to a determination whether the employer's alleged reason for the discharge was the actual one. Once it was determined that the employee had not been removed or disciplined in an effort to interfere with rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, the Board's statutory mandate, and perforce its inquiry, would end. If the teacher had in fact been discharged because of the employer's belief that he or she was unqualified to teach in a parochial school, the "validity as a part of church doctrine" (Pet. App. 33a) of that belief would play no part in the Board's decision.[17] The Board and the reviewing

[17] The Act does not proscribe discharge of an employee for religious reasons, whether the employer is a parochial school, a manufacturer, or any other enterprise subject to its provisions. It "permits a discharge for any reason other than union activity or agitation for collective bargaining with employees * * *. [An employer] is at liberty, whenever occasion may arise, to exercise its undoubted right to sever [the employment] relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132. See also *Picker Corp.*, 222 NLRB 296, 300-301.

court, experienced in deciding unfair labor practice charges in which motivation is the decisive factor, would not be required "to doff their judicial robes and don cassock and miter to untangle the theological knots before them" (Br. in Opp. 9).

This conclusion is in no way altered by the possibility that issues of religious law or polity may sometimes intrude into the secular dispute, since even then the Board would not be required to assess or disturb the decisions of church tribunals regarding purely ecclesiastical matters. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-710, 723 n. 15; *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449; *Gonzalez* v. *Archbishop*, 280 U.S. 1, 15-16. Where a particular motivation is an essential element of a statutory violation, courts and agencies have never been foreclosed from deciding whether a defense based upon a religious motive has been established. As this Court stated in *United States* v. *Seeger*, 380 U.S. 163, 180 n. 3, 185, in construing the "religious training and belief" exemption under the selective service laws:

> [W]hile the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—

> a prime consideration to the validity of every claim for exemption as a conscientious objector.

See also *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 215-216; *United States* v. *Ballard*, 322 U.S. 78; *Ballard* v. *United States*, 152 F.2d 941, 943 (C.A. 9), reversed on other grounds, 329 U.S. 187.

It is of course true that the Board's assertion of jurisdiction over parochial schools may require church officials on occasion to justify actions alleged to have been taken in violation of the Act. But there is no reason to believe that the necessity of proving to the satisfaction of the Board or the courts that a bargaining position was asserted in good faith or that an employee was not discharged for a prohibited (*i.e.*, antiunion) reason would deter such officials from taking that action.[18] The court of appeals offered no evidence that other employers subject to the Act have compromised their authority to manage their businesses out of fear of Board scrutiny of their decisions.

Moreover, this speculative concern, even if legitimate, would not support a blanket exemption from the

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[18] The situation of the Employers is in sharp contrast to that in *Speiser* v. *Randall*, 357 U.S. 513, on which the court below relied in concluding that the Act would have a "chilling" effect (Pet. App. 30a). In *Speiser*, this Court invalidated a state statute that placed the burden upon an individual to prove he had not engaged in criminal speech in order to qualify for a tax exemption. The Employers, on the other hand, will never be called upon to demonstrate the lawfulness of any employment decision unless the Board's General Counsel can first sustain the burden of proving that the action amounts to a *prima facie* violation of the Act.

Act. Courts and administrative agencies may not become involved in essentially religious controversies (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*, 426 U.S. at 696), but a religious institution is not relieved of the obligation to defend its position in a lawsuit over secular issues simply because of its status or the context in which the dispute has arisen. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549; *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908. See also *Pacific Union Conference of Seventh-Day Adventists* v. *Marshall*, No. A-81, decided August 2, 1977 (Rehnquist, Circuit Justice). *A fortiori*, it is not entitled to be excluded from the obligations imposed by general legislation because of the fear that its actions might someday lead to litigation over wholly secular controversies.

2. In any event, even if there were a possibility that the Board in a future case might inquire into the validity of a doctrinal position in the course of an unfair labor practice proceeding, that would provide no justification for holding the Act unconstitutional as applied in the present case, where the Employers did not seek to justify their refusal to bargain on any church doctrine, the legitimacy of their religious beliefs was not at issue, and the prospect of an impermissible governmental entanglement with or impairment of religious affairs was wholly conjectural. As this Court stated in *Associated Press* v. *National Labor Relations Board*, *supra*, 301 U.S. at 131-132, in rejecting a similar claim that applica-

tion of the Act to a newspaper would lead to inevitable interference with the First Amendment guarantee of freedom of the press:

> The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." * * * The actual reason for his discharge, as shown by the unattacked finding by the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below, nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

See also *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 761; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610; *United States* v. *Raines*, 362 U.S. 17, 21.

In sum, the Employers' position amounts in essence to the claim that they have a constitutional right to commit unfair labor practices—that, even

though their operations fall within the language of the Act, they may refuse to bargain with the representatives of their employees and may discharge or otherwise discriminate against employees because of union activity. They make this claim despite their concession that their religious beliefs do not sanction, much less require, the conduct of their labor relations in a manner found by Congress to be contrary to the public interest.[19] Rather, the Employers contend that the Board, in determining whether an unfair labor practice may have been committed, necessarily would be forced to intrude into prohibited areas. Because these fears are unfounded or, at the very least, speculative, the court of appeals erred in declaring the Act unconstitutional as applied to the Employers and in denying enforcement of the Board's orders.

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[19] Compare *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 218, where the Court found that the State's compulsory education law "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child * * * [and] affirmatively compels them, under threats of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," and *Sherbert* v. *Verner*, *supra*, 374 U.S. at 404, where the State's denial of unemployment compensation to a Seventh-Day Adventist who refused to work on Saturday forced an applicant for unemployment compensation benefits "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

B. *The Board's Assertion of Jurisdiction over the Employers is Justified by a Compelling Governmental Interest*

The Employers, it bears repeating, have never contended that the Board's bargaining orders would require them to take action inconsistent with their religious beliefs. Even if the Board's assertion of jurisdiction over parochial schools could be shown to regulate conduct that was based on religious convictions, however, that regulation would be permissible if justified by a compelling governmental interest. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214. Without question, there is a compelling interest in extending the important rights guaranteed by the Act to the large number of lay teachers employed in parochial schools.

The National Labor Relations Act reflects Congress' judgment that the denial of the right of employees to organize and to bargain through representatives of their own choosing is likely to lead to strikes and other economic instability that would disrupt the free flow of commerce. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42.[20] The Act attempts to prevent such dis-

[20] Section 1 of the Act, 29 U.S.C. 151, sets forth the following congressional findings:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

ruptions by "encouraging the practice and procedure of full * * * freedom of association, self-organization, and designation of representatives of [the employees'] own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. 151. Congress vested the Board with the "fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause" (*National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226) to implement this policy, making no distinction as to the size or kind of private employer involved. See 29 U.S.C. 152(2); *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391-393; *Polish National Alliance* v. *National Labor Relations Board*,

322 U.S. 643, 648.[21] Indeed, the court of appeals agreed that the Act covers all private nonprofit educational institutions that affect commerce, including those that are religiously affiliated (Pet. App. 8a). See also *National Labor Relations Board* v. *Wentworth Institute*, 515 F.2d 550 (C.A. 1).[22]

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[21] Contrary to the view of the court of appeals (Pet. App. 32a), Congress' exclusion of government instrumentalities from the statutory coverage is irrelevant to the question whether there is a constitutional bar to an extension of the Act to all employees of private employers whose operations affect commerce. The Act applies to private secular schools no less than to private religious schools.

[22] The Board has chosen to confine the exercise of its jurisdiction over employers within a particular class to those whose operations have a substantial impact on commerce, as measured by gross annual revenues and other factors. 29 U.S.C. 164(c)(1). See note 7, *supra*. The Board has further determined to apply this standard only to those parochial schools that do not differ materially from other private educational institutions. Thus, the Board will assert jurisdiction over parochial schools that provide a general course of study and extracurricular activities similar to those offered by other private schools but not over those that teach primarily religious subjects (see note 7, 8, *supra*).

The court of appeals misperceived the purpose of the Board's discretionary jurisdictional standard in concluding that it was inconsistent with this Court's recent decisions involving public aid to church-related schools (Pet. App. 14a-26a). The Board's determination does not rest on the premise that the Constitution draws a distinction between "completely religious" and other religious institutions. Rather, it reflects the Board's informed judgment that the policies of the Act are best effectuated by confining the exercise of the Board's jurisdiction over parochial schools to those schools that are similar to, and therefore within the class of, other nonprofit educational institutions over which the Board has asserted jurisdiction.

Congress was warranted in not exempting parochial schools from the rights and obligations that the Act imposes on other private employers and employees engaged in operations that affect commerce. There are more than 10,000 parochial schools, employing more than 100,000 teachers,[23] in the United States, and the impact of these schools on interstate commerce is substantial.[24] Labor disputes involving teachers are as likely to arise in church-related schools as they are in other private schools, with the consequent disruptions to commerce and to the economy that Congress sought to avoid.[25] By affording parochial school employees, including lay teachers, the opportunity to select a representative under the Act's election procedures and, through that representative, to bargain collectively with school officials respecting wages,

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[23] There are 107,856 lay faculty members alone in the 9,976 primary and secondary schools affiliated with the Catholic Church in this country. *Official Catholic Directory*, general summary, pp. 1-2 (1977). See also President's Panel on Nonpublic Education, Final Report 5-6, 15-19 (1972), reprinted in Hearings on H.R. 1614 and other proposals before the House Committee on Ways and Means, 92d Cong., 2d Sess. 118-119, 127-131 (1972). The presidential panel placed the figure at more than 18,000 primary and secondary parochial schools with a total attendance of 5.2 million children.

[24] The schools here meet the Board's $1 million monetary jurisdictional standard. See Pet. App. 88a-89a, 93a n. 2.

[25] See, *e.g.*, *Henry M. Hald High School Association*, 213 NLRB 415; *Nazareth Regional High School* v. *National Labor Relations Board*, 549 F.2d 873 (C.A. 2); Lett & Mleczko, *Teachers' union demands troubling Catholic schools*, The Detroit Sunday News, July 12, 1977.

hours, and other working conditions, the statute attempts to minimize the unrest, conflicts and dissatisfactions that all too frequently result where employees are denied these opportunities.[26]

The courts previously have recognized the importance of this federal interest in labor peace in rejecting claims that the Act's mandatory bargaining [27] and union shop [28] provisions must yield to conflicting religious beliefs.[29] As the District of Columbia Circuit

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[26] The Act also affords parochial schools protection against certain unfair practices by labor organizations, such as secondary boycotts and jurisdictional strikes. See 29 U.S.C. 158(b)(4).

[27] *Cap Santa Vue, Inc.* v. *National Labor Relations Board*, 424 F.2d 883, 890 (C.A.D.C.).

[28] *Yott* v. *North American Rockwell Corp.*, 501 F. 2d 398, 403 (C.A. 9); *Hammond* v. *United Papermakers & Paperworkers Union*, 462 F. 2d 174, 175 (C.A. 6), certiorari denied, 409 U.S. 1028; *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 17-18 (C.A. 1), certiorari denied, 404 U.S. 872. Cf. *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 236-238 (rejecting First Amendment challenge to union security provisions of Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 152, Eleventh).

[29] The governmental interest in preventing economic strife is no less substantial than other interests that previously have been held to justify neutral legislation indirectly impinging on the right to act upon religious convictions. See, *e.g.*, *Braunfeld* v. *Brown*, 366 U.S. 599 (state law barring retail sales on Sunday); *Prince* v. *Massachusetts*, 321 U.S. 158 (state child labor law); *King's Garden, Inc.* v. *Federal Communications Commission*, 498 F. 2d 51 (C.A.D.C.), certiorari denied, 419 U.S. 996 (federal rules against sectarian employment practices); *Parker* v. *Commissioner*, 365 F. 2d 792, 795 (C.A. 8), certiorari denied, 385 U.S. 1026 (federal income tax law);

stated in one such case, *Cap Santa Vue, Inc.* v. *National Labor Relations Board, supra*, 424 F.2d at 890, "there can be little doubt that there is a compelling public interest in applying the good faith collective bargaining requirement uniformly to all employers and labor unions." The interest in applying the Act to parochial schools that affect commerce is equally strong. Such schools are in many ways indistinguishable from the other private schools that are within the Board's jurisdiction. See *Board of Education* v. *Allen, supra*, 392 U.S. at 248. Since the Employers do not contend that their religious beliefs preclude them from bargaining with a union or require them to discharge employees who join a union or engage in union activity, there is no justification for not applying the Act to their labor relations.

II. The Board's Assertion Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Do Not Violate The Establishment Clause Of The First Amendment

In order to pass muster under the Establishment Clause of the First Amendment, "a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits

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United States v. *Kissinger*, 250 F. 2d 940, 943 (C.A. 3), certiorari denied, 356 U.S. 958 (federal agricultural marketing law); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, 884-885 (C.A. 7), certiorari denied, 347 U.S. 1013 (federal minimum wage law); *Watchtower Bible & Tract Society* v. *Los Angeles County*, 181 F. 2d 739 (C.A. 9), certiorari denied, 340 U.S. 820 (state property tax law).

religion, and must not foster an excessive government entanglement with religion." *Wolman* v. *Walter*, *supra*, 433 U.S. at 236. There is no doubt that the Act has "a secular legislative purpose" and that its primary effect, even as applied to parochial schools, "neither advances nor inhibits religion." Relying on decisions of this Court declaring unconstitutional programs of state aid to parochial schools,[30] the Employers assert (Br. in Opp. 6), and the court of appeals found (Pet. App. 17a-26a), that the Act nonetheless violates the Establishment Clause because of the dangers of "excessive government entanglement" with the religious administration of the school.

The cases involving aid to pupils in church-related elementary and secondary schools involved efforts by the government to furnish monetary support to the secular function of the schools. Accomplishment of this aim inevitably required the state to oversee the content of classroom instruction and to scrutinize a variety of school operations to ensure that the funds were not being used for religious purposes.[31] By con-

[30] See, *e.g.*, *Roemer* v. *Board of Public Works of Maryland*, *supra*, 426 U.S. at 736; *Meek* v. *Pittenger*, 421 U.S. 349; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 602.

[31] In *Lemon* v. *Kurtzman*, *supra*, for example, the "possibility" that conflicts would arise as a result of the State's inquiry into the religious content of funded programs was far from speculative. The inquiry was mandated not only by the state statute, but also by the State's "duty to resist any possible unconstitutional payment." *New York* v. *Cathedral Academy*, No. 76-616, decided December 6, 1977, slip op.

trast, application of the Act to parochial schools neither involves the payment of funds nor obliges the Board to monitor the schools' religious activities. The Board's functions are to afford the employees in such schools a fair opportunity to determine whether they desire to be represented by a union for collective bargaining purposes and, if a union is selected, to protect its right to engage in bargaining. The Board performs these functions daily in connection with employers engaged in a variety of other businesses (including some, such as the newspaper industry, that also are clothed with First Amendment protection against undue government interference) without overseeing, much less substituting its judgment for the employer in, substantive business decisions. There is no reason to assume that it will be unable to discharge its responsibilities in the context of parochial schools without becoming enmeshed in religious matters.[32]

Contrary to the Employers' contention (Br. in Opp. 5-6), the Establishment Clause objections to the Board's assertion of jurisdiction over parochial schools

7. See also *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480.

[32] Moreover, if the Board were ever to issue an order that invaded First Amendment rights, the Employers would have ample opportunity under the Act to obtain judicial review before they would be required to comply with the order (see p. 29, *supra*). Hence, the Board's assertion of jurisdiction over religiously-affiliated schools does not present the "comprehensive, discriminating and continuing state surveillance" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619) found to be inherent in some school aid programs.

are no more weighty because the present cases involve teachers. We do not deny that teachers are in "a unique position to influence the hearts and minds of their pupils" (*id.* at 6), but nothing in the Act would preclude the Employers from discharging any teacher who sought to inculcate his students with views that are contrary to church doctrines.[33]

Although the court of appeals did not dispute this proposition, it was concerned by the statement of Board counsel during oral argument that the Board would be required to make an "accommodation" to the religious purposes of the school in a situation where an employee had been discharged in part for

[33] The Employers are not aided by *McClure* v. *Salvation Army*, 460 F. 2d 553 (C.A. 5), certiorari denied, 409 U.S. 896 (Br. in Opp. 9-10). There the court, after concluding that the requirements of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, would unconstitutionally impinge upon the employment relationship between an organized church and its ministers, which the court described as the "life-blood" of the church (*id.* at 558), interpreted Title VII not to apply to that relationship. Whether the requirements of the National Labor Relations Act similarly would interfere impermissibly with the relationship between church and clergy is not before this Court, for the instant cases involve only laymen employed to teach in parochial schools. Indeed, the Fifth Circuit stressed in *McClure* that it was "[r]estricting [its] decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy * * *" (*id.* at 555). Moreover, although the court held the church-minister relationship exempt from Title VII's requirements, it recognized that "[o]rganizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes" (*id.* at 557).

heresy and in part for union activity (Pet. App. 40a). Such an accommodation, the court feared, would require the Board to accord religious employers an exception to "well-established principles applicable to all other employers in the labor relations area" (*id.* at 45a), and thus would "in the constitutional sense 'establish' the religions with which it deals" (*id.* at 50a; Sprecher, J., concurring). These fears are unfounded and are based on a misunderstanding of the Board's position.

In the situation hypothesized, the Board would not weigh the substantiality of the religious reason for the discharge and, if it agreed that the reason was sufficiently substantial, permit it to "override somehow the fact that the discharge * * * was also motivated by antiunion reasons" (Pet. App. 43a).[34] Rather, it would apply to religious schools the same legal principle applicable to all other employers, *i.e.*, the employer would not be ordered to reinstate an employee, even though his discharge was in part unlawfully motivated, if the employee had engaged in conduct that rendered him unfit for future employment with the employer. See, *e.g.*, *Beaver Bros. Baking Co., Inc., d/b/a American Beauty Baking Co.*, 198 NLRB 327, 331; *National Labor Relations*

[34] A "discharge will violate § 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity." *National Labor Relations Board* v. *Pembeck Oil Corp.* 404 F. 2d 105, 109 (C.A. 2), vacated on other grounds and remanded *sub nom. Atlas Engine Works, Inc.* v. *National Labor Relations Board*, 395 U.S. 828.

Board v. *Apico Inns of California, Inc.*, 512 F.2d 1171, 1175-1176 (C.A. 9); *National Labor Relations Board* v. *Commonwealth Foods, Inc.* (*West End*), 506 F.2d 1065, 1067-1068 (C.A. 4); *National Labor Relations Board* v. *Coca Cola Bottling Co.*, 333 F.2d 181, 185 (C.A. 7).

In sum, there is no contention that the Board has failed to act neutrally with regard to religion in applying the Act to all church-related elementary and secondary schools that fall within its jurisdictional guidelines. Indeed, the Employers' true complaint is that the Board has been entirely too scrupulous in its neutrality by refusing to grant their schools a special exemption from general statutory obligations solely because of their "religious mission." The court of appeals, by recognizing an exemption from the Act based upon religious considerations that are either nonexistent or at best speculative, has disregarded this Court's admonitions that such exemptions should be fashioned by the courts only in those rare instances in which they are "vital * * * to the protection of values promoted by the right of free exercise" and that the courts "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause * * *." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220-221.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions to enforce the Board's orders.

Respectfully submitted.

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